Common "Domestic Violence Crimes"

CHAPTER 3

In This Chapter...

3.1 Chapter Overview

As discussed in Section 1.5, domestic abusers employ a wide variety of tactics to maintain control over their victims. Accordingly, criminal behavior in situations involving domestic violence may take many forms, so that any crime can be a "domestic violence crime" if perpetrated as a means of controlling an intimate partner. "Domestic violence crimes" may be directed against the person, property, animals, family members, or associates of the abuser's intimate partner.

The only specific "domestic violence crimes" that this chapter will address in detail are domestic assault, parental kidnapping, stalking, and witness tampering. In Section 3.14, however, the reader will find a list of other Michigan criminal offenses that are likely to arise from domestic abuse. Because there are so many offenses on this list, a detailed discussion of each one is beyond the scope of this benchbook.

> **Note:** In the Violence Against Women Act, the U.S. Congress created three federal domestic violence crimes that are beyond the scope of this benchbook. These offenses are found at: 18 USC 2261 (traveling in interstate or foreign commerce or entering or leaving Indian country with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and thereby committing a crime of violence); 18 USC 2261A (traveling in interstate or

foreign commerce, or within the special maritime and territorial jurisdiction of the United States, or entering or leaving Indian country with the intent to kill, injure, or harass another person and thereby placing that person in reasonable fear of death or serious bodily injury to him/herself or to a member of his/her immediate family); and, 18 USC 2262 (traveling in interstate or foreign commerce or entering or leaving Indian country to violate a protection order).

3.2 Domestic Assault

A. Elements of Offense; Penalties for First-Time Offenders

In general, MCL 750.81(1) punishes assault or assault and battery as a misdemeanor offense subject to imprisonment for not more than 93 days and/or a maximum $500.00 fine. In subsections (2) to (4), however, the statute contains special penalty provisions for situations where the victim has one of the following relationships with the assailant:

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81(6).
- The victim is a resident or former resident of the same household as the assailant.

For a jury instruction on domestic assault, see CJI2d 17.2a.

First-time offenders who have one of the foregoing domestic relationships with the victim are subject to misdemeanor sanctions of not more than 93 days imprisonment and/or a maximum $500.00 fine. MCL 750.81(2). First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 3.6(A).

The Michigan Court of Appeals has addressed who may be included as a resident within the same household under the domestic assault statute. In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition in probate court charging a 16-year-old girl with battering her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts' decision, holding that:

> "When a statute is clear and unambiguous, judicial interpretation is precluded . . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute . . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim's relationship with the offender." 226 Mich App at 87-88.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaultive behavior between college roommates who were not romantically involved. 226 Mich App at 88, n 4.

> **Note:** The dissenting judge on the *Lovell* panel would have required residence in the household plus a romantic involvement as a prerequisite to coverage under MCL 750.81(2).

MCL 750.81 does not apply to an individual using "necessary reasonable physical force" as authorized in MCL 380.1312 to maintain order in a school setting. MCL 750.81(5).

B. Enhanced Penalties for Repeat Offenders

The penalties for domestic assault as defined in MCL 750.81(2) are enhanced for individuals who violate that statute after a previous conviction of certain other assaultive offenses. If the prior conviction involved a crime listed in MCL 750.81(3)-(4), and that prior crime was committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, or a resident or former resident of the assailant's household,* the penalties for the current offense will be enhanced as follows:

*There is no statutory requirement that the victim involved in the prior conviction be the same person as the victim of the current offense.

- Offenders with a single prior conviction "may be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.81(3).
- Offenders with 2 or more prior convictions are "guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both." MCL 750.81(4).

The prior offenses that result in enhanced penalties under MCL 750.81(3)-(4) are:

- A violation of MCL 750.81 (assault);
- A violation of MCL 750.81a (assault and infliction of serious injury);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);

*For discussion of special problems arising from ordinance violations, see Section 3.6(C).

- A violation of a local ordinance substantially corresponding to MCL 750.81;* or,
- A violation of a law of another state or a local ordinance of another state that substantially corresponds to any of the above statutes.

C. Procedures for Seeking an Enhanced Sentence

*MCL 750.81a(3) is domestic assault and infliction of serious injury. See Section 3.3 for a discussion of MCL 750.81a(3).

If the prosecutor seeks an enhanced sentence for domestic assault under MCL 750.81(3)-(4) or MCL 750.81a(3)*, the procedural requirements of MCL 750.81b apply:

> "(a) The charging document or amended charging document shall include a notice provision that states that the prosecuting attorney intends to seek an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL 750.81a(3)] and lists the prior conviction or convictions that will be relied upon for that purpose. The notice shall be separate and distinct from the language charging the current offense, and shall not be read or otherwise disclosed to the jury if the case proceeds to trial before a jury.
>
> "(b) The defendant's prior conviction or convictions shall be established at sentencing. The existence of a prior conviction and the factual circumstances establishing the required relationship between the defendant and the victim of the prior assault or assault and battery may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> "(*i*) A copy of a judgment of conviction.
>
> "(*ii*) A transcript of a prior trial, plea-taking, or sentencing proceeding.
>
> "(*iii*) Information contained in a presentence report.
>
> "(*iv*) A statement by the defendant.
>
> "(c) The defendant or his or her attorney shall be given an opportunity to deny, explain, or refute any evidence or information relating to the defendant's prior conviction or convictions before the sentence is imposed, and shall be permitted to present evidence relevant for that purpose unless the court determines and states upon the record that the challenged evidence or information will not be considered as a basis for imposing an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL 750.81a(3)].
>
> "(d) A prior conviction may be considered as a basis for imposing an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL 750.81a(3)] if the court finds the existence of both of the following by a preponderance of the evidence:

"(*i*) The prior conviction.

"(*ii*) 1 or more of the required relationships between the defendant and the victim of the prior assault or assault and battery."

D. Domestic Assault as a Lesser Included Offense

Two types of lesser-included offenses exist: (1) necessarily included offenses; and (2) cognate (or allied) lesser offenses. A necessarily included offense is one in which all the elements of the offense are contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser. *People v Bearss*, 463 Mich 623, 627 (2001). See also *People v Veling*, 443 Mich 23, 36 (1993) (the evidence at trial will always support the lesser offense if it supported the greater). A cognate or allied lesser offense is one that "share[s] some common elements, and [is] of the same class or category as the greater offense, but ha[s] some additional elements not found in the greater offense." *People v Perry*, 460 Mich 55, 61 (1999), quoting *People v Hendricks*, 446 Mich 435, 443 (1994).

> **Note**: For a comprehensive discussion of lesser-included offenses, see *Hendricks*, *supra* at 441-451 and *People v Bailey*, 451 Mich 657, 667-676 (1996).

The following offenses, often associated with domestic violence, are divided into degrees:

- Child abuse, see Section 3.14(A)(2);
- Homicide, see Section 3.14(A)(4);
- Criminal sexual conduct, see Section 3.14(A)(7); and
- Home invasion, see Section 3.14(B)(3).

MCL 768.32(1), a statute governing lesser-included offenses, must be applied to all offenses that are expressly divided into degrees and to offenses in which different grades or offenses or degrees of enormity are recognized. *People v Cornell*, 466 Mich 335, 353-354 (2002), citing *Hanna v People*, 19 Mich 316 (1869).

MCL 768.32(1) provides:

> "Except as provided in subsection (2),* upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."

*MCL 768.32(2) covers lesser-included offenses for specified controlled substance offenses.

In reference to MCL 768.32(1) and its application to lesser-included offenses, the Supreme Court in *Cornell, supra*, made a number of determinations. First, it explained that the word "inferior" in MCL 768.32(1) means that the statute only authorizes lesser offenses that either are necessarily included in the greater offense or that are attempts to commit the greater offense. *Cornell*, *supra* at 354, 354 n 7. Second, the Supreme Court held that, based on its interpretation of the statute, MCL 768.32(1) "does not permit cognate lesser offenses." *Cornell*, *supra* at 354. On this last point, see also *People v Pasha*, 466 Mich 378, 384 n 9 (2002) ("Following our decision in *Cornell*, the trier of fact may no longer convict a defendant of a cognate lesser offense."). Third, the Supreme Court held that instructions for necessarily included lesser offenses under MCL 768.32(1) are not limited to felonies and may include misdemeanors. *Cornell*, *supra* at 358-359. In so holding, the Supreme Court expressly overruled the following cases that permitted cognate lesser offenses and that "blatantly disregarded" MCL 768.32(1): *People v Jones*, 395 Mich 379 (1975); *People v Chamblis*, 395 Mich 408 (1975); *People v Stephens*, 416 Mich 252 (1982); and *People v Jenkins*, 395 Mich 440 (1975). *Cornell*, *supra* at 357-358.

The Supreme Court in *Cornell* established the following rule for determining whether an instruction for a necessarily included lesser offense is proper:

> "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell*, *supra* at 357.

See also *People v Silver*, 466 Mich 386, 392-393 (2002) (breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion and, as applied to facts of case, was appropriate since the distinguishing element was factually disputed and substantial evidence supported the lesser included offense).

In *People v Corbiere*, 220 Mich App 260 (1996), the Michigan Court of Appeals held that domestic assault is not a necessarily included lesser offense of third degree criminal sexual conduct. However, the court in *Corbiere* applied the five-step test that was articulated in *People v Stephens*, 416 Mich 252, 261-265 (1982), which was expressly overruled by *Cornell, supra* at 367.

3.3 Domestic Assault and Infliction of Serious Injury

MCL 750.81a(1) punishes "a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder." The Criminal Jury Instructions define a "serious or aggravated injury" as "a physical injury that requires immediate medical treatment or that causes

disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4).

In subsections (2) and (3), this statute contains special penalty provisions for aggravated assaults where the victim has one of four types of relationships with the assailant:

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81a(4).
- The victim is a resident or former resident of the same household as the assailant. See Section 3.2(A) for discussion of who is included as a resident of the same household.

If the victim has one of these four types of domestic relationship with the assailant, the following penalties apply:

- A first-time offender is subject to misdemeanor sanctions of imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.81a(2). First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 3.6(A).
- An assailant with one or more previous convictions of certain other assaultive offenses is guilty of a felony punishable by imprisonment for not more than two years and/or a fine of not more than $2,500.00. MCL 750.81a(3). To be subject to enhanced penalties, the prior conviction must have involved a crime listed in MCL 750.81a(3) and have been committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, or a resident or former resident of the assailant's household. There is no statutory requirement that the victim involved in a prior conviction be the same person as the victim of the current offense.

The prior offenses that result in enhanced penalties under MCL 750.81a(3) are:

- A violation of MCL 750.81a (domestic assault and infliction of serious injury);
- A violation of MCL 750.81 (domestic assault, assault and battery);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);

*For discussion of special problems arising from ordinance violations, see Section 3.6(C).

- A violation of a local ordinance substantially corresponding to MCL 750.81a;* or,
- A violation of a law or local ordinance or another state substantially corresponding to one of the above enumerated crimes.

If the prosecutor seeks an enhanced sentence for domestic assault and infliction of serious injury under MCL 750.81a(3), the procedural requirements of MCL 750.81b apply. These requirements are set forth in full at Section 3.2(C).

3.4 Warrantless Arrest in Domestic Assault Cases

MCL 764.15a authorizes the warrantless arrest of an individual for violating MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, if the arresting officer has reasonable cause to believe (or receives positive information that another peace officer has reasonable cause to believe) both of the following:

- The violation occurred or is occurring; and,
- The individual arrested has had a child in common with the victim, has or has had a dating relationship with the victim, resides or has resided in the same household as the victim, or is a spouse or former spouse of the victim.

In *Klein v Long*, 275 F3d 544 (CA 6, 2001), the United States Court of Appeals for the Sixth Circuit provided guidance on determining probable cause in domestic violence cases. In *Klein*, David Klein had an argument with his wife. After the argument, Mr. Klein pushed one of his children back down into a chair and instructed the child to stay there. Mrs. Klein went into the kitchen to call the police. Mr. Klein followed her into the kitchen and grabbed the phone from Mrs. Klein. In the process of grabbing the phone, Mrs. Klein was cut. Mrs. Klein then left the house and called 911 from a cell phone. When she spoke to the dispatcher, she indicated that Mr. Klein had been "grabbing and pushing" her and the children. When the police arrived, they found Mrs. Klein in front of the house. She was visibly upset, and her finger was bleeding. After questioning Mrs. Klein and the children, the officers placed Mr. Klein under arrest. Mr. Klein was held for 24 hours and released without being charged. Mr. Klein filed suit against the officers claiming that they violated his constitutional rights. The officers moved for summary judgment claiming that they had probable cause to arrest the defendant therefore did not violate his constitutional rights. The trial court denied the motion for summary judgment, and the officers filed an interlocutory appeal. The Court of Appeals reversed, concluding that the officers had probable cause to arrest the defendant. The Court provided the following guidance in determining probable cause:

> "The physical evidence of battery in the bleeding finger, combined with Mrs. Klein's description to the officers of Mr. Klein's

> grabbing and pushing and her immediate fear of Mr. Klein, constitutes a sufficient factual basis for the finding of probable cause.
>
> . . .
>
> "Thus, to have probable cause to arrest, a police officer must take into account all the evidence -- both inculpatory and exculpatory --that he has at the time of the arrest. Where the police have sufficient inculpatory evidence to give rise to a determination of probable cause and they do not know of any exculpatory evidence, we have held that 'the failure to make a further investigation does not negate probable cause.' *Coogan v. City of Wixom*, 820 F.2d 170, 173 (6th Cir. 1987) (internal quotation omitted); see also *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988)." *Klein, supra* at 552.

Warrantless arrest authority under MCL 764.15a extends regardless of whether the violation was committed in the presence of the arresting officer. The Michigan Attorney General has concluded that reasonable cause to arrest may exist even in the absence of physical evidence of domestic abuse.* See OAG, 1994, No 6822 (November 23, 1994), which states as follows:

> "It is my opinion . . . that, under MCL 764.15a; MSA 28.874(1), a peace officer, in a domestic relations matter, may make a warrantless arrest for a misdemeanor of assault or assault and battery committed outside of the officer's presence, in the absence of physical evidence of domestic abuse, when there is other corroborating evidence sufficient to constitute probable cause to believe that the person to be arrested committed the offense."

*The U.S. Attorney General has also concluded that this warrantless arrest statute is constitutional. See OAG, 1985-1986, No 6296, p 79 (May 21, 1985).

MCL 764.9c(3)(a) prohibits the issuance of an appearance ticket to persons arrested without a warrant for violating MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, if the victim of the assault is the offender's spouse, former spouse, an individual who has or has had a dating relationship with the offender, an individual who has had a child in common with the offender, or an individual residing or having resided in the same household as the offender.

> **Note:** For warrantless arrest provisions applicable in other situations that may involve domestic violence, see:
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> - MCL 764.15(1)(d) (peace officer has "reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.")
> - MCL 764.15(1)(g) (violation of a condition of probation or parole).

- MCL 764.15b (violation of a personal protection order). This statute is discussed in Section 8.5.
- MCL 764.15e (violation of a pretrial release condition issued in a criminal proceeding for protection of a named person). This statute is discussed in Section 4.10.

3.5 Parental Kidnapping

This section addresses parental kidnapping in its criminal context. For discussion of civil remedies for violation of custody orders issued in domestic relations proceedings, and steps courts can take to discourage parental kidnapping, see Sections 12.9 and 12.10.

A. Elements of Parental Kidnapping; Penalties

Under Michigan law, parental kidnapping is a felony. MCL 750.350a(1) defines this offense as follows:

> "An adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights pursuant to a lawful court order at the time of the taking or retention, or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention."

*See also CJI2d 19.6.

The elements of parental kidnapping are as follows:*

- The defendant must be an adoptive or natural parent of the child; and
- The defendant must have:
  - taken the child from a person having the lawful charge of the child at the time of the taking; or
  - retained the child for more than 24 hours beyond the time when the defendant should have returned the child to the person having the lawful charge of the child; and
- The defendant must have had the intent to detain or conceal the child from:
  - the person having lawful charge of the child at the time;
  - the parent or legal guardian who had custody or parenting time rights at the time; or
  - the person who had adopted the child.

A person convicted under the parental kidnapping statute is subject to imprisonment for not more than one year and one day and/or a maximum fine of $2,000.00. MCL 750.350a(2). Additionally, the court may order the

offender to make restitution for any financial expense incurred as a result of attempting to locate and have the child returned. Restitution may be made to the child's other parent, legal guardian, adoptive parent, or to any other person with lawful charge of the child. MCL 750.350a(3). Offenders with no prior kidnapping convictions may be eligible for deferred proceedings under MCL 750.350a(4), discussed at Section 3.6(B).

It is possible to violate this statute in the absence of a court order. In *People v Reynolds*, 171 Mich App 349 (1988), the defendant took a child from a grandparent who was baby-sitting. Because the child was born out-of-wedlock, there was no custody or parenting time order governing the rights of the parents. Nonetheless, the Court of Appeals held that the defendant was criminally liable for taking the child from the grandparent, who had lawful charge of him as a baby-sitter at the time of the taking. 171 Mich App at 352-353.

It is also possible for a parent to be convicted under the statute without receiving formal notice of the court's order giving custody to the other parent. In *People v McBride*, 204 Mich App 678 (1994), the defendant was separated from his wife in September, 1991. On September 25, 1991, the circuit court entered an ex parte order granting his wife sole custody of their children. On October 17, 1991, the defendant absconded with the children to California. Although his wife had told him about the custody order prior to October 17, it was not served on him until after that date. The Court of Appeals held that the failure of service did not prevent the district court from binding the defendant over for trial on criminal charges under the parental kidnapping statute. The panel noted that the statute contains no requirement that a parent be formally served with a custody order before he or she can be charged with parental kidnapping. It requires only that the parent from whom the child is taken have custody or parenting time rights pursuant to a lawful court order at the time of the taking or retention. 204 Mich App at 682.

The parental kidnapping statute applies to parents who retain a child in another jurisdiction after taking the child from Michigan. In *People v Harvey*, 174 Mich App 58 (1989), the defendant abducted a child from Michigan five years before the 1983 enactment of the parental kidnapping statute and detained her in Colorado until 1986. The Court of Appeals held that the defendant had violated MCL 750.350a and was subject to the jurisdiction of the Michigan courts. The panel stated: "Acts done outside a state which are intended to produce, and in fact do produce, detrimental effects within the state may properly be subject to the criminal jurisdiction of the courts of that state. The detrimental effects of defendant's intentional *retention* of the girl [after 1983] in violation of the Michigan court's custody order occurred here, in Michigan, since it was the authority of a Michigan court that was thwarted and it was the custodial right of a Michigan resident that was infringed upon." 174 Mich App at 61 [emphasis added.]

B. Defenses to Parental Kidnapping

*For a jury instruction on this defense, see CJI2d 19.7. A discussion of the harmful effects of adult domestic violence on children appears at Section 1.7(B).

MCL 750.350a(5) provides an affirmative defense to parents who prove that they acted to protect the child "from an immediate and actual threat of physical or mental harm, abuse, or neglect."* This defense applies on its face only to actions taken to prevent harm to the *child*. The statute does not mention situations in which the defendant *parent* is threatened with harm, abuse, or neglect. As of the publication date of this benchbook, no Michigan appellate court has addressed the operation of this defense to parental kidnapping in a case involving a parent's flight from adult abuse. However, it is interesting to note a provision in the Child Custody Act, MCL 722.27a(6)(h), stating that a parent's temporary residence with a child in a domestic violence shelter does not amount to evidence of the parent's intent to conceal the child from the other parent for purposes of determining the frequency, duration, and type of parenting time.

In addition to the statutory affirmative defense, the common law defense of duress may apply in parental kidnapping cases. To establish duress, a defendant must show: 1) threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; 2) the conduct actually caused such fear in the defendant's mind; 3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act; and 4) the defendant committed the act to avoid the threatened harm. *People v Luther*, 394 Mich 619, 623 (1975). The defendant has the burden of providing some evidence from which the jury can conclude that the defendant acted under duress. If the defendant meets this burden of production, then the prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If a defendant denies that he or she has committed a crime, that defendant is not entitled to a jury instruction on duress. *People v McKinney*, 258 Mich App 157, 164 (2003) (defendant sought to prove that she lived with defendant out of fear but denied committing major controlled substance offenses). For a jury instruction and commentary on duress, see CJI2d 7.6.

> **Note:** For specific circumstances supporting a defense of duress, see MCL 768.21b(4), which lists six conditions for a jury to consider in deciding whether a defendant acted under duress in escaping from prison. These conditions are illuminating because they are similar to conditions that are present in many relationships involving domestic violence: 1) whether the defendant was faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future; 2) whether there was insufficient time for a complaint to the authorities; 3) whether there was a history of complaints by the defendant which failed to provide relief; 4) whether there was insufficient time or opportunity to resort to the courts; 5) whether force or violence was not used towards innocent persons in the escape; and 6) whether the defendant immediately reported to the proper

authorities upon reaching a position of safety from the immediate threat.

3.6 Deferred Sentencing for Domestic Assault and Parental Kidnapping

The Michigan Legislature has enacted deferred sentencing provisions for offenders charged with the following crimes:

- Domestic assault and battery or aggravated domestic assault. MCL 769.4a.
- Parental kidnapping. MCL 750.350a(4).
- Use or possession of a controlled substance. MCL 333.7411.

Additionally, deferred proceedings are available for most criminal defendants age 17 or older and under 21, under the Holmes Youthful Trainee Act, MCL 762.11, et seq. (Life-offense felonies, major controlled substance offenses, and traffic offenses are excepted from the Act.).

This section will provide more detailed information about the deferral statutes governing domestic assault and parental kidnapping. Deferred proceedings under the Controlled Substances Act and the Holmes Youthful Trainee Act are beyond the scope of this benchbook.

A. Deferred Proceedings Under the Domestic Assault Statutes

An offender who is found guilty of, or pleads guilty to, a violation of MCL 750.81, MCL 750.81a, or a local ordinance substantially corresponding to MCL 750.81,* may be eligible for deferred proceedings under MCL 769.4a. In order for the offender to be eligible, one of the following must apply:

*See Sections 3.2-3.3 on these domestic assault crimes.

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 769.4a(1).
- The victim is a resident or former resident of the same household as the assailant. See Section 3.2(A) for discussion of who is included as a resident of the same household.

MCL 769.4a allows the court to place the defendant on probation after a finding of guilt, without entering judgment. If the defendant subsequently violates a condition of probation, the court may enter an adjudication of guilt

and impose sentence — in certain cases the court is required to do so. If the defendant fulfills the conditions of probation, the court must discharge him or her and dismiss the proceedings without an adjudication of guilt. This discharge and dismissal does not operate as a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. An individual may be discharged and dismissed only one time under the deferral statute. The Department of State Police is charged with keeping nonpublic records of proceedings under the statute to ensure that repeat offenders do not benefit from multiple deferrals.

Deferred proceedings under MCL 769.4a are authorized *only* if the following criteria are met:

- The defendant has no previous conviction under MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81.*
- The defendant consents to deferred proceedings.
- The prosecuting attorney, in consultation with the victim, consents to deferred proceedings.

*For discussion of special problems arising from ordinance violations, see Section 3.6(C).

Before ordering deferred proceedings in cases meeting the above criteria, the court must contact the Department of State Police to determine whether the defendant has previously been convicted under MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, or has previously availed himself or herself of proceedings under the deferral statute. If State Police records indicate that a defendant was previously arrested for a violation of MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, but that there was no disposition, the court must contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of the arrest.

Orders of probation under MCL 769.4a(3) may require the defendant to participate in a "mandatory counseling program," and to pay the costs of this program. For more information on batterer intervention services, see Sections 2.3 - 2.4.

Upon a violation of a term or condition of probation, the court has discretion to enter an adjudication of guilt and impose sentence. MCL 769.4a(2). However, MCL 769.4a(4) *requires* the court to enter an adjudication of guilt and proceed to sentencing if any of the following three circumstances exist:

- The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.
- The accused violates an order of the court that he or she have no contact with a named individual.
- The accused commits an assaultive crime during the period of probation. An "assaultive crime" means a violation of one or more of the following:
  - Assault under MCL 750.81.

- Assault and infliction of serious injury under MCL 750.81a.
- Threats or assault against an FIA employee under MCL 750.81c.
- Assault, battering, resisting, obstructing, or opposing a person performing his or her duty under MCL 750.81d.
- Felonious assault under MCL 750.82.
- Assault with intent to commit murder under MCL 750.83.
- Assault with intent to do great bodily harm less than murder under MCL 750.84.
- Assault with intent to maim under MCL 750.86.
- Assault with intent to commit a felony under MCL 750.87.
- Unarmed assault with intent to rob and steal under MCL 750.88.
- Armed assault with intent to rob and steal under MCL 750.89.
- Sexual intercourse under pretext of medical treatment under MCL 750.90.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual under MCL 750.90a.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in a miscarriage or stillbirth under MCL 750.90b(a).
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in great bodily harm to the embryo or fetus under MCL 750.90b(b).
- Gross negligence against a pregnant individual under MCL 750.90c.
- Operating a vehicle while impaired or while under the influence of intoxicating liquors resulting in an accident with a pregnant individual under MCL 750.90d.
- Conduct as proximate cause of accident involving pregnant individual under MCL 750.90e.
- Infant Protection Act under MCL 750.90g.
- Attempt to murder under MCL 750.91.
- Explosives; common carriers for passengers; transportation under MCL 750.200.
- Manufacture, delivery, possession, transport, placement, use, or release of biological, chemical, or radioactive device or substance under MCL 750.200i.
- Manufacture, delivery, possession, transport, placement, use, or release of chemical irritant, chemical irritant device, smoke device, or an imitation device or substance under MCL 750.200j.
- Acts causing false belief of exposure under MCL 750.200*l*.
- Explosives exploded by concussion or friction under MCL 750.201.
- Marking of explosives intended for shipment under MCL 750.202.

- Sending explosives with intent to kill or injure persons or damage property under MCL 750.204.
- Representing or presenting a device as an explosive, incendiary device, or bomb under MCL 750.204a.
- Placing explosive substances with the intent to destroy and cause injury to any person under MCL 750.207.
- Placing an offensive or injurious substance with intent to injure, coerce, or interfere with a person or property under MCL 750.209.
- Possession of explosive substance or device in a public place under MCL 750.209a.
- Possession of a substance that when combined will become explosive or combustible with the intent to use unlawfully under MCL 750.210.
- Possession, sale, purchase, or transport of valerium under MCL 750.210a.
- Possession of a device designed to explode upon impact, upon application of heat or a highly incendiary device with intent to use unlawfully under MCL 750.211a.
- Manufacture or sale any high explosive which is not marked under MCL 750.212.
- First-degree murder under MCL 750.316.
- Second-degree murder under MCL 750.317.
- Manslaughter under MCL 750.321.
- Kidnapping under MCL 750.349.
- A prisoner taking another as a hostage under MCL 750.349a.
- Kidnapping a child under 14 under MCL 750.350.
- Mayhem under MCL 750.397.
- First-degree criminal sexual conduct under MCL 750.520b.
- Second-degree criminal sexual conduct under MCL 750.520c.
- Third-degree criminal sexual conduct under MCL 750.520d.
- Fourth-degree criminal sexual conduct under MCL 750.520e.
- Assault with intent to commit criminal sexual conduct under MCL 750.520g.
- Armed robbery; aggravated assault under MCL 750.529.
- Carjacking under MCL 750.529a.
- Unarmed robbery under MCL 750.530.
- Terrorism under MCL 750.543f.
- Hindering the prosecution of terrorism under MCL 750.543h.
- Providing material support for terrorist acts or soliciting material support for terrorism under MCL 750.543k.
- Making a terrorist threat or false report of terrorism under MCL 750.543m.

- Unlawful use of the internet, telecommunications, or electronic device to disrupt the functions of the public safety, educational, commercial, or governmental operations under MCL 750.543p.
- Obtaining or possessing certain information about a vulnerable target under MCL 750.543r.

Note: Domestic violence may occur as an abusive pattern that tends to escalate over time. MCL 769.4a is intended to intervene in abusive behavior during its early stages by offering the offender an incentive to seek assistance in changing his or her behavior before it escalates to a more dangerous level. For this reason, the statute's provisions for deferred sentencing are inappropriate for multiple offenders, or for offenders who are at risk for committing serious violent acts. See Section 1.4(B) for a discussion of lethality factors.

B. Deferred Sentencing in Parental Kidnapping Cases

Under MCL 750.350a(4), the court may defer imposition of sentence if a person found guilty of violating the parental kidnapping* statute meets both of the following criteria:

*The elements of parental kidnapping are discussed at Section 3.5(A).

- The defendant must not have been previously convicted of violating the parental kidnapping statute, the general kidnapping statute (MCL 750.349), or the statute governing kidnapping of children under 14 (MCL 750.350).
- The defendant must not have been previously convicted of violating any statute of the United States or any state related to kidnapping.

If there are no prior disqualifying convictions and the defendant consents, the court may place the defendant on probation "with lawful terms and conditions" without entering a judgment of guilt. If the defendant violates a condition of probation, the court has discretion to enter a judgment of guilt and proceed to sentencing. If the defendant fulfills the terms and conditions of probation, however, the court must dismiss the proceedings without an adjudication of guilt. The defendant's discharge and dismissal under this provision do not operate as a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions.

To prevent repeat offenders from being sentenced under the deferred proceedings option, MCL 750.350a(4) requires the Department of State Police to keep a nonpublic record of arrests and discharges and dismissals under the parental kidnapping statute. When requested, the Department must furnish this record to a court or police agency to show whether a defendant in a criminal action has already been subject to deferred proceedings. It is thus important for courts to communicate with the State Police about parental kidnapping proceedings to prevent repeat offenders from improperly receiving deferrals.

C. Deferred Sentencing and Local Ordinances

*See Section 1.4(B) on lethality factors.

Domestic violence crimes are different from most other types of crime because these offenses often occur as part of an abusive pattern that may tend to escalate over time. Moreover, the perpetrator of a domestic violence crime usually has ready access to the victim due to the parties' living situation or arrangements for access to children. These characteristics place victims of domestic violence crimes at great risk of injury from re-offense. To adequately protect domestic violence crime victims in setting bond conditions and imposing (or deferring) sentence, it is important for the court to have information about the past behavior of the accused that will enable it to make a safety assessment.*

*See Sections 3.2(B)-3.3 on sentence enhancement for domestic assault. Bond conditions are discussed in Chapter 4.

State Police records are a critical source of information about the past criminal behavior of an individual. The appropriate use of deferred sentencing options in domestic assault and parental kidnapping cases is dependent upon the court's communication with the State Police regarding prior offenses. Police records are also needed for purposes of setting bond conditions under MCR 6.106 and imposing enhanced sentences for repeat domestic assault offenders under MCL 750.81(3)-(4) and MCL 750.81a(3).*

Prior convictions for local ordinance violations may not appear in State Police records if they do not carry the 93-day penalty that triggers the fingerprinting requirements of MCL 28.243. Under this provision, local law enforcement authorities *must* take fingerprints and send them to the State Police after the arrest or conviction of a person charged with a felony or a misdemeanor for which the maximum penalty exceeds 92 days imprisonment or a fine of $1,000.00, or both. MCL 28.243(1)-(2). Local law enforcement authorities must also take fingerprints and forward them to the State Police if a person is arrested for a violation of a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible term of imprisonment is 93 days. Local authorities *may* take fingerprints for other misdemeanor offenses and may send them to the State Police. MCL 28.243(5). Thus, State Police records will be incomplete to the extent that local authorities exercise their discretion to fingerprint and report persons convicted of ordinance violations carrying a maximum 92-day jail term. In some jurisdictions, these gaps in the State Police records have permitted persons with previous convictions of domestic assault ordinance violations to avoid enhanced penalties or to improperly receive a deferred sentence under MCL 769.4a upon their first conviction under state law.

To improve the tracking of misdemeanor ordinance violations, the Michigan Legislature has amended the statutes governing townships, cities, villages, and other municipalities, authorizing these entities to adopt ordinances with 93-day terms of imprisonment in cases where the ordinance would substantially correspond to a state statute that also imposes a maximum 93-day term of imprisonment. See, e.g., MCL 41.183(5). The 93-day penalties under these ordinances will trigger fingerprinting requirements under MCL

28.243(2), facilitating the compilation of a criminal history in the event that a misdemeanant later commits another offense.

3.7 Stalking Generally — Behavior Patterns and Legal Relief

Stalking — the willful, repeated harassment of another person — does not necessarily involve parties who are in a domestic relationship. A stalker can be any person whose behavior harasses another person; the media frequently report incidents in which the stalker is a stranger to or co-worker of the victim. Nonetheless, this chapter includes a discussion of stalking because domestic abusers often stalk their victims. Stalking behavior in a domestic relationship may arise from the abuser's obsessive jealousy or possessiveness of the victim. A jealous, possessive abuser may constantly monitor the victim's activities during the relationship. When the victim leaves or attempts to leave the relationship, the abuser may refuse to accept the end of the relationship and continue or escalate surveillance of the victim.* The abuser may subject the victim to ongoing harassment and pressure tactics, including multiple phone calls, homicide or suicide threats, uninvited visits at home or work, and manipulation of children.

*Adams, *Identifying the Assaultive Husband in Court: You Be the Judge,* Boston Bar Journal 23, 24 (July/August, 1989).

Abusers who stalk may be prepared to kill the victim rather than relinquish control over the victim's life. Thus, stalking behavior is a significant indicator of an abuser's potential lethality, particularly if it escalates in severity or increases in frequency when the victim attempts to leave the relationship or seeks court intervention to end the abuse. Prompt action to protect the victim is necessary when abusive behavior exhibits the foregoing (or any other) signs of potential lethality.*

*See Section 1.4(B) for discussion of factors indicating potential lethality.

Until January 1, 1993, civil injunctive relief or tort damages were the only remedies the courts could offer to stalking victims who could not show that the harassment had risen to the level of criminal assault against the victim or the victim's property. These civil remedies did not provide effective, accessible relief because they were not readily issued by the courts or enforced by police. To better protect victims, the Michigan Legislature enacted four anti-stalking statutes during its 1992 session.* Effective January 1, 1993, these statutes provided both criminal and civil remedies against stalking.

*1992 PA 260, 261, 262.

Two of the statutes enacted in 1992 contain criminal penalties for stalking. As enacted, MCL 750.411h imposed misdemeanor sanctions for less serious stalking behavior, while MCL 750.411i governed felony aggravated stalking. In addition to the criminal stalking statutes, the Legislature created two new civil remedies for stalking victims during its 1992 session. Effective January 1, 1993, a stalking victim could: 1) obtain an injunctive order restraining stalking (now known as a "personal protection order"), pursuant to MCL 600.2950a,* or, 2) file a civil action for damages against a stalker, pursuant to MCL 600.2954. 1992 PA 262.

*Anti-stalking orders under this statute became one of two types of "personal protection order" created in 1994. See Section 6.2.

The discussion that follows in Sections 3.8 - 3.12 and 3.14(A) will address all of the stalking statutes enacted in 1992, except for MCL 600.2950a, which is discussed in Section 6.4.

3.8 Misdemeanor Stalking

A. Elements of the Offense

*This statute contains felony penalties if the victim is less than 18 years of age at any time during the offense, and the offender is five or more years older than the victim. See Section 3.8(C).

"Stalking" is a criminal misdemeanor under MCL 750.411h.* In subsection (1)(d), the statute defines stalking as follows:

- "[A] willful course of conduct involving repeated or continuing harassment of another individual";
- "[T]hat would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and
- "[T]hat actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The following definitions further explain this offense:

- A "course of conduct" involves "a series of 2 or more separate, noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). See also *Pobursky v Gee*, 249 Mich App 44, 47-48 (2002).
- "Harassment" means conduct directed toward a victim that includes, but is not limited to, "repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c).
- "Emotional distress" means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).
- Under MCL 750.411h(1)(e), "unconsented contact" means "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Unconsented contact includes, but is not limited to:
  - Following or appearing within the victim's sight.
  - Approaching or confronting the victim in a public place or on private property.
  - Appearing at the victim's workplace or residence.
  - Entering onto or remaining on property owned, leased, or occupied by the victim.
  - Contacting the victim by phone, mail, or electronic communications.
  - Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

Note: A stalker's contacts with the victim may be both consented and unconsented. For example, a victim may consent to telephone calls from a former spouse to arrange for parenting time without consenting to the former spouse's appearance at his or her workplace. In these cases, the court might distinguish consented from unconsented contact and inquire whether the unconsented contact meets the requirements of the stalking statute.

In a criminal prosecution for stalking, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4). For a discussion of the constitutionality of this provision, see Section 3.12(C).

The crime of stalking does not require the victim and the perpetrator to have a prior domestic relationship. Nonetheless, the prosecution may choose to charge a defendant with stalking in domestic situations where:

- The elements for other domestic violence crimes cannot be proved;* or,
- The separate acts constituting the stalking behavior are less serious when considered as individual criminal acts than they are when considered cumulatively.

*See Section 3.1 for a definition of a "domestic violence crime."

For a jury instruction on the elements of stalking, see Section 3.11(A).

B. Legitimate Purpose Defense to Stalking

MCL 750.411h(1)(c) creates defenses to stalking for "**constitutionally protected activity**" or "**conduct that serves a legitimate purpose**." A similar defense exists under the aggravated stalking statute, MCL 750.411i(1)(d). Constitutionally protected activities are discussed in Section 3.12(B).

The Court of Appeals addressed the legitimate purpose defense in *People v Coones*, 216 Mich App 721, 725-726 (1996). The Court found that the defendant was not entitled to a jury instruction on the "legitimate purpose" defense under the aggravated stalking statute, despite his assertions that contact with his estranged wife was made for the purpose of preserving their marriage. Defendant forcibly entered his wife's residence after she had obtained a restraining order against him, in violation of the order. Given this illegitimate conduct on defendant's part, his "ends justifies the means" argument did not require the trial court to instruct the jury on "legitimate purpose" under the statute.

C. Penalties for Misdemeanor Stalking

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, misdemeanor stalking is punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.411h(2)(a). The court may place the offender on probation for a term of not more than five years. MCL 750.411h(3) and MCL 771.2a(1). If the court orders probation, it may impose any lawful condition of probation, and in addition, may order the offender to:

- Refrain from stalking any individual during the term of probation;
- Refrain from having any contact with the victim of the offense; or,
- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.* MCL 750.411h(3).

*See Section 4.14(C) on batterer intervention services as a condition of probation.

MCL 750.411h(2)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, stalking is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both.

*For juvenile offenders, see MCL 780.794.

Victims of misdemeanor stalking are entitled to restitution from the defendant under MCL 780.826.*

The foregoing penalties for stalking may be imposed in addition to any penalties that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct. MCL 750.411h(5). Regarding double jeopardy concerns with this provision, see Section 3.12(A).

3.9 Felony Aggravated Stalking

The following discussion sets forth the elements of and the penalties for felony aggravated stalking. For a discussion of the "legitimate purpose" defense to a stalking prosecution, see Section 3.8(B). "Constitutionally protected activities" are addressed in Section 3.12(B).

A. Elements of Aggravated Stalking

*See Section 3.8(A) on this definition.

The aggravated stalking statute, MCL 750.411i(1), contains the same definition of "stalking" as found in the misdemeanor stalking statute, MCL 750.411h(1).* However, an offender's behavior becomes felony aggravated stalking if it also involves any of the following circumstances set forth in MCL 750.411i(2):

- At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. "Actual notice" is not defined in MCL 750.411i. In *People v Threatt*, 254 Mich App 504, 506-507 (2002), the Michigan Court of Appeals held that actual notice does not mean service. Knowledge of the restraining order constitutes actual notice. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court. For a stalking case holding that violation of an Illinois protective order in Iowa could lawfully serve as the basis for elevation of the charges under Iowa's stalking statutes, see *State v Bellows*, 596 NW2d 509 (Ia, 1999).
- At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.
- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. A "credible threat" is a threat to kill or to inflict physical injury on another person, made so that it causes the person hearing the threat to reasonably fear for his/her own safety, or for the safety of another. MCL 750.411i(1)(b).
- The offender has been previously convicted of violating either of the criminal stalking statutes.

In a criminal prosecution for aggravated stalking, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411i(5). For a discussion of the constitutionality of this provision, see Section 3.12(C).

For a jury instruction on the elements of aggravated stalking, see Section 3.11(A).

B. Penalties for Aggravated Stalking

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, aggravated stalking is punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both. MCL 750.411i(3)(a). Under MCL 750.411i(4),* the court may place an offender on probation for any term of years, but not less than five years. If it orders probation, the court may impose any lawful condition and may additionally order the offender to:

*MCL 771.2a(2) makes similar provision.

- Refrain from stalking any individual during the term of probation;
- Refrain from any contact with the victim of the offense; and

*See Section 4.14(C) on batterer intervention services as a condition of probation.

- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.*

MCL 750.411i(3)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years or a fine of not more than $15,000.00, or both.

*For juvenile offenders, see MCL 780.794.

Victims of aggravated stalking are entitled to restitution from the defendant under MCL 780.766.* For a discussion of procedural issues regarding restitution, see *People v White*, 212 Mich App 298, 316 (1995) (where the stalking victim's statement that her financial losses "equaled hundreds or thousands of dollars" was unsubstantiated by other evidence, remand to the trial court for an evidentiary hearing was necessary).

The foregoing penalties for stalking may be imposed in addition to any penalties that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct. MCL 750.411i(6). Regarding double jeopardy concerns with this provision, see Section 3.12(A).

3.10 Unlawful Posting of a Message Using an Electronic Medium of Communication

Effective April 1, 2001, the Michigan Legislature has specifically addressed stalking behavior in which the offender posts a message using an electronic medium of communication. MCL 750.411s(1) sets forth the basic offense as follows:

> "(1) A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:
>
> > "(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.
> >
> > "(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.
> >
> > "(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

> "(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Violation of the foregoing provision is a felony punishable by imprisonment for not more than two years or a fine of not more than $5,000.00, or both. MCL 750.411s(2)(a).

Like the general stalking statutes, this statute provides increased penalties when there are aggravating circumstances. If any of the following circumstances apply, the offender is subject to imprisonment for not more than five years or a fine of not more than $10,000.00, or both, under MCL 750.411s(2)(b):

> "(*i*) Posting the message is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.
>
> "(*ii*) Posting the message is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.
>
> "(*iii*) Posting the message results in a credible threat being communicated to the victim, a member of the victim's family, or another individual living in the same household as the victim.
>
> "(*iv*) The person has been previously convicted of violating this section or [MCL 750.145d (use of computer technology to commit specified crimes against minor victims), MCL 750.411h or 750.411i (stalking and aggravated stalking), or MCL 752.796 (use of computer technology to commit a crime)] or a substantially similar law of another state, a political subdivision of another state, or of the United States.
>
> "(*v*) The victim is less than 18 years of age when the violation is committed and the person committing the violation is 5 or more years older than the victim."

The court may order a person convicted under either MCL 750.411s(2)(a) or (b) to reimburse the state or a local unit of government for expenses incurred in relation to the violation, in the same manner as provided in MCL 769.1f (governing expenses for emergency response to and prosecution of specified offenses). MCL 750.411s(4).

A person charged under this statute may also be charged with, convicted of, or punished for "any other violation of law committed by that person while violating or attempting to violate this section." MCL 750.411s(5).

This offense does not apply to:

- "[A]n internet or computer network service provider who in good faith, and without knowledge of the specific nature of the message posted, provides the medium for disseminating information or communication between persons." MCL 750.411s(3).
- "[C]onstitutionally protected speech or activity." MCL 750.411s(6).*

*See Section 3.12(B) for more information about this issue.

MCL 750.411s(7) contains the following jurisdictional requirements:

> "A person may be prosecuted in this state for violating or attempting to violate this section only if 1 of the following applies:
>
> "(a) The person posts the message while in this state.
>
> "(b) Conduct arising from posting the message occurs in this state.
>
> "(c) The victim is present in this state at the time the offense or any element of the offense occurs.
>
> "(d) The person posting the message knows that the victim resides in this state."

MCL 750.411s(8) contains the following definitions:

> "(a) 'Computer' means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.
>
> "(b) 'Computer network' means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.
>
> "(c) 'Computer program' means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.
>
> "(d) 'Computer system' means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

"(e) 'Credible threat' means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.

"(f) 'Device' includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

"(g) 'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

"(h) 'Internet' means that term as defined in . . . the communications act of 1934 . . . 47 U.S.C. 230.

"(i) 'Post a message' means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim.

"(j) 'Unconsented contact' means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

"(*i*) Following or appearing within sight of the victim.

"(*ii*) Approaching or confronting the victim in a public place or on private property.

"(*iii*) Appearing at the victim's workplace or residence.

"(*iv*) Entering onto or remaining on property owned, leased, or occupied by the victim.

"(*v*) Contacting the victim by telephone.

"(*vi*) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network.

"(*vii*) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim.

> "(k) 'Victim' means the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family."

It is also unlawful to use the internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit stalking under MCL 750.411h or aggravated stalking under MCL 750.411i. MCL 750.145d(1)(b).

3.11 Procedural Issues in Criminal Stalking Cases

This section sets forth the criminal jury instruction on stalking or aggravated stalking. It also summarizes Court of Appeals cases that have considered the evidence required to bind a defendant over for trial on aggravated stalking charges and the propriety of the same judge presiding over civil and criminal proceedings arising from stalking behavior.

A. Jury Instruction on Stalking

*For discussion of the elements of stalking or aggravated stalking, see Sections 3.8(A) and 3.9(A).

CJI2d 17.25 contains a jury instruction on stalking and aggravated stalking, which is quoted below. The comments inserted within the quoted instruction reflect changes to the instruction suggested by members of the Advisory Committee for this chapter of the benchbook. These changes are suggested in order to make the instruction more consistent with the stalking statutes.*

> "(1) [The defendant is charged with/You may consider the lesser offense of] stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> "(2) First, that the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact with [*name complainant*]."
>
> > **Comment:** To be more consistent with the statutes, the instruction might insert the words "*evidencing a continuity of purpose*" after the complainant's name. MCL 750.411h(1)(a), MCL 750.411i(1)(a). Moreover, the instruction might add the statutory definition of "unconsented contact" at this point. MCL 750.411h(1)(e) and MCL 750.411i(1)(f).
>
> "(3) Second, that the contact would cause a reasonable individual to suffer emotional distress.
>
> "(4) Third, that the contact caused [*name complainant*] to suffer emotional distress."

Comment: The instruction might add the statutory definition of "emotional distress" at this point. MCL 750.411h(1)(b) and MCL 750.411i(1)(c).

"(5) Fourth, that the contact would cause a reasonable individual to feel [terrorized/ frightened/ intimidated/ threatened/ harassed/ molested].

"(6) Fifth, that the contact caused [*name complainant*] to feel [terrorized/ frightened/ intimidated/ threatened/ harassed/ molested].

"[*For aggravated stalking, add the following:*]

"(7) Sixth, the stalking

"[was committed in violation of a court order]

"[included the defendant making one or more credible threats against the complainant, a member of (his/her) family, or someone living in (his/her) household]

"[was a second or subsequent stalking offense]."

Comment: If the evidence warrants it, the instruction should state that stalking does not include conduct that serves a legitimate purpose. See Section 3.8(B).

B. Sufficiency of Evidence

People v Kieronski, 214 Mich App 222 (1995) addressed the sufficiency of evidence required to bind a defendant over for trial on charges of aggravated stalking. Here, the prosecutor appealed from a decision of the Recorder's Court to quash an information against defendant alleging aggravated stalking. The Court of Appeals vacated the Recorder's Court order and reinstated the charge, finding that the evidence presented at the preliminary examination was sufficient to bind the defendant over for trial. The sole witness at the preliminary examination was defendant's ex-wife, who had obtained an ex parte order from the Wayne Circuit Court providing that defendant was to have no contact with her.* After the order was issued and defendant had actual notice of it, the witness testified that defendant had threatened her on three occasions — twice in person as she conducted business with the court and once when he telephoned her at her parents' house, saying, "I'll get you."

*The Court of Appeals' opinion does not specify the type of injunctive order at issue in this case.

C. Disqualification of Judge

*See Section 2.6(B) for more discussion of MCR 2.003(B).

In *People v Coones,* 216 Mich App 721, 726-727 (1996), the Court of Appeals held that the same judge who issued a temporary restraining order in defendant's divorce case and found defendant guilty of contempt for violating it could also preside over the defendant's criminal trial for aggravated stalking. Under MCR 2.003(B), a judge should be disqualified if he or she cannot impartially hear a case because of personal bias for or against a party or attorney.* The party seeking disqualification must show "actual prejudice" under this rule, except in cases where the judge might have prejudged the case because of prior participation as accuser, investigator, fact finder, or initial decision-maker. Here, disqualification was not required because the defendant failed to show actual prejudice on the part of the trial judge. Moreover, the trial judge's participation in the show cause hearing on the temporary restraining order did not require disqualification. The temporary restraining order was issued in defendant's divorce case and the trial judge did not participate as the fact finder or decision-maker in pretrial proceedings in the criminal stalking case.

3.12 Constitutional Questions Under the Criminal Stalking Statutes

This section summarizes cases upholding Michigan's criminal stalking statutes over constitutional challenges on double jeopardy, overbreadth, and due process grounds.

A. Double Jeopardy

*For more discussion of double jeopardy issues, see Section 8.12.

The Fifth Amendment to the U.S. Constitution and Article 1, §15 of the Michigan Constitution prohibit putting a criminal defendant twice in jeopardy for the same offense. This guarantee against double jeopardy affords separate protections against: 1) successive prosecutions for the same offense; and 2) protection against multiple punishments for the same offense. *People v Sturgis*, 427 Mich 392, 398-399 (1986).* In the following stalking cases, the Court of Appeals addressed double jeopardy objections based on alleged violations of both of these interests.

1. Successive Prosecution

In *People v White*, 212 Mich App 298 (1995), the defendant continuously stalked his victim from September 1992, through August 1993, making threats to kill the victim and her children. The stalking continued even after defendant was served with a temporary restraining order forbidding him from assaulting, beating, molesting, or wounding the victim. As a result, two separate complaints were issued against defendant. One complaint charged him with felony aggravated stalking. A second misdemeanor complaint charged defendant with violating a municipal ordinance identical to MCL

750.411h. Defendant pled guilty to both charges, but objected to the felony prosecution on double jeopardy grounds. The Court of Appeals found defendant's objection meritless. Citing *People v White*, 390 Mich 245, 254, 258-259 (1973), the Court noted that all charges arising against a defendant out of a single criminal act, occurrence, episode, or transaction must be joined at one trial. In this case, however, the charges against defendant did not arise out of a single transaction, but from distinct occurrences on distinct dates. The felony complaint stated that in June 1993, defendant repeatedly harassed the victim in violation of a restraining order, and made a credible threat to kill her or inflict physical injury upon her. The misdemeanor complaint alleged that in July 1993, defendant stalked, pursued, or terrorized the victim by calling her place of employment, threatening to kill her and her family members. The Court of Appeals held that these were two separate episodes of stalking, rejecting defendant's assertion that stalking is a continuous act for which he could receive only one punishment. 212 Mich App at 305-308.

2. Multiple Punishments

The Court of Appeals in *People v Coones*, 216 Mich App 721, 727-728 (1996) held that separate convictions of aggravated stalking and criminal contempt for violation of a temporary restraining order are not multiple punishments in violation of double jeopardy, even though they are based upon the same conduct. The guarantee against double jeopardy does not prevent the Legislature from imposing separate penalties for what would otherwise be a single offense. The determinative inquiry is thus whether the Legislature *intended* to impose cumulative punishment for similar crimes. *People v Robideau*, 419 Mich 458, 485 (1984). With regard to aggravated stalking, the Legislature has clearly expressed its intent to impose multiple punishments for aggravated stalking and criminal contempt. MCL 750.411i(6) states:

> "A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct."

> **Note:** An identical double jeopardy provision exists in the misdemeanor stalking statute, MCL 750.411h(5).

B. Vagueness and Overbreadth

An effective stalking law must be general enough to encompass the wide variety of behaviors that can constitute stalking, without being so broad as to run afoul of the Constitution. In *People v White*, 212 Mich App 298 (1995), the Michigan Court of Appeals upheld the Michigan stalking statutes over objections based on vagueness and overbreadth.* The Court of Appeals' reasoning in this case was later examined in the context of a federal habeas corpus proceeding and found to be a reasonable application of federal law.

*For further commentary on these issues, see Kowalski, *The Michigan Stalking Law: Is It Constitutional?* 73 Mich Bar J 926 (1994).

After his victim ended her dating relationship with him, the defendant in *People v White, supra,* made hundreds of telephone calls to her home and workplace, threatening to kill her and her family members. After his arrest, defendant pled guilty to misdemeanor stalking in violation of a township ordinance substantially similar to the state misdemeanor statute, to attempted aggravated stalking under the state statute, and to habitual offender-third. On appeal from his conviction, defendant asserted that the stalking statutes were unconstitutionally vague, and that they abridged his First Amendment right to free speech by permitting the complainant to determine subjectively which telephone calls were acceptable and which were criminal.

The Court of Appeals in *White* rejected defendant's challenge to the statutes. The Court stated that a statute may be challenged for vagueness if it: 1) is overbroad, impinging on First Amendment rights; 2) does not provide fair notice of the conduct proscribed; or 3) confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. 212 Mich App at 309. Applying these standards, the Court held that the Michigan criminal stalking statutes were not unconstitutionally vague. The Court reasoned that the stalking statutes are not overbroad and do not impinge on the defendant's constitutional right to free speech. The statutes specifically exclude constitutionally protected speech, addressing instead a willful pattern of unconsented conduct — including conduct combined with speech — that would cause distress to a reasonable person. Defendant's repeated verbal threats to kill the victim and members of her family were neither protected speech, nor conduct serving a "legitimate purpose" of reconciliation. 212 Mich App at 310-311.

Moreover, the Court of Appeals found that the stalking laws provide fair notice of the proscribed conduct. The U.S. Supreme Court has stated that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson*, 461 US 352, 357 (1983). Here, a person of reasonable intelligence would not need to guess at the meaning of the stalking statutes. The definitions of crucial words and phrases in the statutes are clear and understandable to a reasonable person reading the statute. Also, the meaning of the words used in the statutes can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves, because they possess a common and generally accepted meaning. 212 Mich App at 312.

Finally, the Court of Appeals determined that the trial court's discretion to decide whether the complainant receives a series of contacts in a positive or a negative fashion does not render the statutes vague. The Court of Appeals held that vagueness can only be established if the wording of the statute itself is vague. 212 Mich App at 313.

Note: See also *People v Ballantyne*, 212 Mich App 628 (1995), in which the Court of Appeals rejected a similar overbreadth

challenge to the aggravated stalking statute for the reasons stated in *People v White, supra*.

The U.S. Court of Appeals for the Sixth Circuit revisited the issues decided in *People v White, supra*, in *Staley v Jones,* 239 F3d 769 (CA 6, 2001). The defendant in the *Staley* case filed a petition for a writ of habeas corpus under 28 USC 2254 in the U.S. District Court for the Western District of Michigan, after the Michigan Supreme Court denied leave to appeal from his conviction of aggravated stalking under MCL 750.411i.* Although it found that the conduct giving rise to the defendant's conviction clearly fell within the scope of conduct that could constitutionally be penalized under the stalking statute, the federal district court nonetheless granted the petition, opining that the statute was overbroad and vague on its face. The district court reasoned that the state court in *White, supra,* had so limited the statutory exclusions for "constitutionally protected activities" and "conduct that serves a legitimate purpose" that the statute could be unconstitutionally applied to protected First Amendment conduct. In support of its decision, the district court cited the following language from *White*:

*28 USC 2254(a) authorizes a federal court to grant a writ of habeas corpus to state prisoners if they are held "in custody in violation of the Constitution or laws or treaties of the United States."

> "Both §411h(1)(c) and §411i(1)(d) state that '[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' *and such protected activity or conduct has been defined as labor picketing or other organized protests*." 212 Mich App at 310 [citation omitted; emphasis added].

From the foregoing language, the district court concluded that the Court of Appeals in *White* intended to limit the statutory exclusions to the two instances mentioned, namely, to labor picketing and other organized protests. Based on this conclusion, the district court found the stalking statute at odds with the First Amendment, because it could criminalize protected speech by such individuals as persistent news reporters or salespersons who cause emotional distress. *Staley v Jones,* 108 F Supp 2d 777, 784-788 (WD Mich, 2000). The district court further stated that if it had not found the statute inconsistent with First Amendment protections, it would have found it unconstitutionally vague because it provides no guidance as to what constitutes a "legitimate purpose." *Id*. at 786 n 4.

The U.S. Court of Appeals for the Sixth Circuit reversed the district court's grant of the habeas corpus petition, finding, among other things, that the district court had misinterpreted the controlling state precedent set forth in *White.* The appellate panel found that the *White* court's reference to labor picketing and other organized protests was meant to be illustrative of protected activities; the panel found "no indication" that the *White* court meant this reference to constitute an exhaustive list. 239 F3d at 783. This misreading of *White* "improperly colored" the district court's analysis of the overbreadth issue. *Id.*

*28 USC 2254(d)(1) requires the federal court in a habeas corpus proceeding to determine whether the state court's decision is contrary to, or an unreasonable application of, federal law.

The Sixth Circuit further rejected defendant's assertions that the Michigan Court of Appeals had unreasonably applied federal law in upholding the aggravated stalking statute over his constitutional challenges to them.* With respect to the defendant's challenge on overbreadth grounds, the Sixth Circuit panel held that the *White* court's application of federal law as set forth in *Broadrick v Oklahoma,* 413 US 601 (1973) was a reasonable application of federal law:

> "In short, even if the state court of appeals wrongly assessed the First Amendment implications in relation to the statute's legitimate reach (and we do not think it did), it cannot be said that the *White* court's application of *Broadrick* was unreasonable. As the Michigan Court of Appeals recognized, the thrust of this statute is proscribing unprotected conduct. Furthermore, any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute . . . . Simply stated, it was not unreasonable for the state court to reject Staley's overbreadth challenge." 239 F3d at 787.

With respect to the defendant's assertions that the statute was vague, the Sixth Circuit panel stated:

> "The state court's conclusion that the Michigan stalking law gives fair notice of what conduct is proscribed is not directly contrary to [U.S.] Supreme Court precedent or an unreasonable application of it . . . . The exclusion for 'conduct that serves a legitimate purpose' is . . . not defined. But this does not transform an otherwise unambiguous statute into a vague one. As the *White* court noted, a person of reasonable intelligence would know whether his conduct was violating the statute." 239 F3d at 791.

The Sixth Circuit's opinion in the *Staley* case also discusses at length the circumstances under which a facial challenge to a statute may be made by someone to whom the statute may constitutionally be applied, a question that is beyond the scope of this discussion.

C. Statutory Presumptions

MCL 750.411i(5) and MCL 750.411h(4) provide that:

> "[E]vidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

In *People v Ballantyne*, 212 Mich App 628, 629 (1995), the Court of Appeals held that the foregoing provisions do not unconstitutionally shift the burden of proof of an element of the offense to the defendant. Adopting the reasoning of *People v White*, 212 Mich App 298, 313-315 (1995), the Court of Appeals upheld MCL 750.411i(5) and MCL 750.411h(4) over objections that these provisions unconstitutionally shift the burden of proof of an element of the offense to the defendant. The Constitution requires that there be some rational connection between the fact proved and the ultimate fact presumed; the presumption of one fact from evidence of another does not constitute a denial of due process of law or of the equal protection of the law. Given the nature of the required conduct necessary to prove stalking, the presumption regarding the victim's state of mind is not so unreasonable as to be purely arbitrary. Moreover, assurance that the prosecutor continues to bear the burden of proof as to each element of stalking is found in MRE 302(b). This rule provides that whenever the existence of a presumed fact against the defendant is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic fact, and that the prosecution still bears the burden of proof beyond a reasonable doubt as to the elements of the offense.

3.13 Witness Tampering

Abusers may use a variety of methods to avoid conviction, including tampering with witnesses. Attempts to influence a victim-witness may include the following:

- giving or promising the victim something of value in exchange for not testifying or changing testimony,
- threatening or intimidating a victim through threats of physical harm,
- interfering with a victim's ability to testify, and
- retaliating against a victim for testifying.

The following discussion sets forth the types of witness tampering and the penalties for each offense.

A. Types of Witness Tampering

Effective March 28, 2001, the Michigan Legislature has specifically addressed witness tampering and intimidation, by enacting MCL 750.122. The witness tampering statute prohibits tampering through bribery, threats, intimidation, interference, or retaliation.

1. Bribery

MCL 750.122 sets forth the basic offense as follows:

"(1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:

"(a) To discourage any individual from attending a present or future official proceeding* as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

"(b) To influence any individual's testimony at a present or future official proceeding.

"(c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

"(2) Subsection (1) does not apply to the reimbursement or payment of reasonable costs for any witness to provide a statement to testify truthfully or provide truthful information in an official proceeding as provided for under . . . MCL 213.66, or . . . MCL 600.2164, or court rule."*

*See Section 3.13(B), below, for the definition of "official proceeding."

*MCL 213.66 provides for witness fees in condemnation proceedings, and MCL 600.2164 regulates the payment of expert witness fees.

It is an affirmative defense to a bribery charge brought pursuant to MCL 750.122(1), that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully. The defendant has the burden of proof to prove the affirmative defense by a preponderance of the evidence. MCL 750.122(4).

MCL 750.122(1) does not apply to the following:

- The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.
- The lawful conduct or communications of a person as permitted by statute or other lawful privilege. MCL 750.122(5).

2. Threats or Intimidation

MCL 750.122(3) prohibits a person from doing any of the following by threat or intimidation:

"(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

"(b) Influence or attempt to influence testimony at a present or future official proceeding.

> "(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."

It is an affirmative defense to a charge brought pursuant to MCL 750.122(3) that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully. The defendant has the burden of proof to prove the affirmative defense by a preponderance of the evidence. MCL 750.122(4).

MCL 750.122(3) does not apply to the following:

- The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.
- The lawful conduct or communications of a person as permitted by statute or other lawful privilege. MCL 750.122(5).

3. Interference

MCL 750.122(6) states as follows:

> "(6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding."

For an illustrative case on witness interference, see *People v Greene,* 255 Mich App 426 (2003). In this case, the defendant was originally charged with manslaughter for the willful killing of an unborn quick child after he allegedly physically assaulted his pregnant girlfriend. At the arraignment, the court ordered the defendant not to have any contact with the victim. At the preliminary examination, the victim testified that she was reluctant to testify against the defendant because she still loved him. She also admitted that she spoke with the defendant after the arraignment but prior to the preliminary examination. The prosecutor then filed a new criminal information charging the defendant with witness interference. At the continuation of the preliminary examination, the parties stipulated that the previous testimony of the victim would be applied to the new charge. The court also received in evidence a taped conversation between the defendant, an acquaintance of his, and the victim. During the conversation, the defendant told the victim not to come to court, even though she was subpoenaed, and suggested a place to hide out for the day. The victim testified that she was not intimidated by the defendant, she did not think he was going to harm her, and she was not afraid to come to court. The district court bound the defendant over for trial. The defendant filed a motion to quash the information arguing that the evidence at the preliminary examination, if true, did not demonstrate that he violated MCL 750.122(6). The circuit court granted the defendant's motion to quash, finding that the magistrate could not have found probable cause to believe that the defendant's contact with the victim violated the narrowly drawn

provisions of the witness tampering statute. The prosecutor appealed. The Court of Appeals articulated the elements of "interference" under MCL 750.122(6) as follows:

> "[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6." *Green, supra* at 442-443.

The Court of Appeals concluded:

> "We do not hold that a request, alone, not to attend a hearing or a stated desire that a witness not attend a hearing would be unlawful under MCL 750.122(6). Neither act would necessarily affect a witness's *ability* to attend a hearing. . . . Rather, in sum, the evidence presented at the preliminary examination would allow a reasonable person to infer that [defendant] knew [the victim] would be attending the preliminary examination to provide testimony against him; . . . [Defendant] then willfully attempted to interfere with [the victim's] intention to attend that hearing by telling her explicitly not to attend, playing to her feelings for him, and assuring her that the consequences would be minor or nonexistent; and this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing, which was to obey the subpoena." *Greene, supra* at 447.

4. Retaliation

After a victim of domestic violence testifies against her abuser, she may be faced with retaliation from the abuser. The abuser's conduct may violate MCL 750.122(8), which provides:

> "A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following:
>
> "(a) Commit or attempt to commit a crime against any person.

"(b) Threaten to kill or injure any person or threaten to cause property damage."

B. Definitions Under the Witness Tampering Statute

The witness tampering statute defines an "official proceeding" as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a). The witness tampering statute applies "regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding." MCL 750.122(9).

MCL 750.122(12)(b) provides that to "threaten or intimidate" does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the otherwise lawful filing of any civil action or police report the purpose of which is not to harass the other person. MCL 750.122(12).

"Retaliate" means to do any of the following:

"(a) Commit or attempt to commit a crime against any person.

"(b) Threaten to kill or injure any person or threaten to cause property damage." MCL 750.122(8).

C. Penalties for Witness Tampering

A person who is convicted of retaliation is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.

A person who violates MCL 750.122 is guilty of a felony punishable by imprisonment for not more than four years and/or a fine of not more than $5,000.00, except in the following circumstances:

- If the violation is committed in a criminal case involving an offense for which the maximum term of imprisonment is more than 10 years, or an offense punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.
- If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by

imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both. MCL 750.122(7).

A person charged under this witness tampering statute may also be charged with, convicted of, or punished for "any other violation of law arising out of the same transaction as the violation of this section." MCL 750.122(10).

"The court may order a term of imprisonment imposed for violating [MCL 750.122] to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of [MCL 750.122]." MCL 750.122(11).

3.14 Other Crimes Commonly Associated with Domestic Violence

As noted in Section 1.5, domestic violence involves a pattern of potentially criminal behavior that can include emotional, financial, physical, and sexual abuse. Such abuse can lead to a variety of criminal charges in addition to assault and battery; indeed, any crime can be characterized as a "domestic violence crime" if it is perpetrated with the intent to control an intimate partner. Although a complete discussion of all possible potential "domestic violence crimes" is beyond the scope of this benchbook, a list of offenses commonly associated with domestic violence is provided here for the reader's convenience.

A. Offenses Against Persons

A domestic violence perpetrator may commit a variety of crimes directed at the person of an intimate partner. In addition, some abusers seek to assert control over their intimate partners through criminal acts directed against the partner's family members, friends, or associates.

1. Assaults

In addition to the domestic assault offenses described in the foregoing sections of this chapter, the Michigan Penal Code penalizes the following types of assaults:

- Felonious assault. MCL 750.82. See CJI2d 17.9.
- Assault with intent to commit murder. MCL 750.83. See CJI2d 17.3 and 17.4.
- Assault with intent to do great bodily harm less than murder. MCL 750.84. See CJI2d 17.7.
- Assault with intent to maim. MCL 750.86. On the elements of this offense, see *People v Ward*, 211 Mich App 489 (1995).
- Assault with intent to commit a felony. MCL 750.87. See CJI2d 17.5.

- Conduct against a pregnant woman that causes death, miscarriage, stillbirth, or physical injury to the embryo or fetus. MCL 750.90a-750.90f. These statutes apply to intentional conduct, gross negligence, drunk driving, and careless or reckless operation of motor vehicles.

For a case involving assault with intent to commit murder, see *People v Hoffman*, 225 Mich App 103, 111 (1997). Here, the defendant sought reversal of his conviction for this offense based on the assertion that there was insufficient evidence. The Court of Appeals disagreed. The elements of this crime are: 1) assault; 2) with actual intent to kill; 3) which, if successful, would make the killing murder. The intent to kill may be proven by inference from any facts in evidence. Here, these elements were established where the defendant knocked his girlfriend down and repeatedly beat the back of her head against a paved sidewalk. He also threw her against the wall of his house, pulled her inside by her hair, punched her in the eye, and hit her on the head and shoulder with a baseball bat. He allowed his dog to repeatedly bite her legs while she was incapacitated.

2. Child Abuse

As noted in Section 1.7(A)(2), some abusers seek to control their intimate partners by perpetrating or threatening violence against their partners' children. The following Michigan Penal Code provisions impose criminal penalties for such behavior:

- First-, second-, third-, or fourth-degree child abuse. MCL 750.136b. This statute prohibits behavior that causes a child any physical harm or serious mental harm. See CJI2d 17.18 through 17.24, and *People v Daoust*, 228 Mich App 1, 14-15 (1998).
- Contribution to the neglect or delinquency of a minor. MCL 750.145 imposes misdemeanor penalties on persons who "by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, as defined in [MCL 712A.2], whether or not such child shall in fact be adjudicated a ward of the probate court."

3. Extortion, Obstruction of Justice

Abusers frequently obtain their partners' silence by threatening them with physical harm if they testify about the abuse in court or report it to the police. In addition to the witness tampering statute discussed in Section 3.13, such conduct is subject to criminal penalties under the following statutes:

- Extortion. MCL 750.213. See CJI2d 21.1-21.6.
- Obstruction of justice. MCL 750.122 and MCL 750.483a.

The above-cited statutes governing obstruction of justice took effect March 28, 2001.* Prior to that date, obstruction of justice was a common law offense governed by MCL 750.505. On the common law elements of this offense, see *People v Towar*, 215 Mich App 318, 320-321 (1996).

*See 2000 PA 451, 452.

For an illustrative case on extortion, see *People v Pena*, 224 Mich App 650 (1997), modified on other grounds 457 Mich 885 (1998). In this case, the defendant assaulted the victim, who reported the assault to the police. The defendant subsequently assaulted the victim a second time, threatening to kill her if she made further reports to the police. A jury convicted the defendant of extortion and obstruction of justice under the above-referenced statutes. On appeal, the Court of Appeals rejected the defendant's argument that the extortion statute did not contemplate the behavior giving rise to the defendant's conviction. The Court stated:

> "When a defendant is charged with extortion arising out of a compelled action or omission, a conviction may be secured upon the presentation of proof of the existence of a threat of immediate, continuing, or future harm . . . . [W]e conclude that the demand by defendant that the victim not talk to the police was an offense contemplated by the extortion statute because the act demanded was of such consequence or seriousness that the statute should apply." 224 Mich App at 656-657.

The Court of Appeals also rejected the defendant's assertion that her convictions of both extortion and obstruction of justice arising from the same incident were in violation of the guarantees against double jeopardy. 224 Mich App at 658.

4. Homicide

Domestic violence can have fatal consequences, either for the victim, or, if the victim is pregnant, for her unborn child. The following statutes govern homicide:

- First-degree murder. MCL 750.316. See CJI2d 16.1, 16.6. On home invasion as an underlying felony to support a conviction for first-degree felony murder, see *People v Warren*, 228 Mich App 336, 345-354 (1998), rev'd in part on other grounds 426 Mich 415 (2000) and *People v McCrady*, 244 Mich App 27 (2000).
- Second-degree murder. MCL 750.317. See CJI2d 16.5, 16.6.
- Manslaughter. MCL 750.321. See CJI2d 16.8, 16.10.
- Wilful killing of an unborn quick child by any injury to its mother that would be murder if it resulted in the death of the mother. MCL 750.322. See *Larkin v Wayne County Prosecutor*, 389 Mich 533, 539 (1973).
- Attempt to murder. MCL 750.91.

5. Injuries or Death Involving Firearms or Dangerous Weapons

The presence of firearms or other weapons can increase the potential for lethality in a situation involving domestic violence.* The following criminal offenses can arise from conduct involving firearms or dangerous weapons:

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence.

- Death resulting from a firearm pointed intentionally, but without malice. MCL 750.329. See CJI2d 16.11.
- Intentionally aiming a firearm without malice. MCL 750.233. See CJI2d 11.23.
- Intentionally discharging a firearm aimed at another without malice and without causing injury. MCL 750.234. See CJI2d 11.24.
- Intentionally discharging firearm at dwelling or occupied structure. MCL 750.234b. See CJI2d 11.26a and CJI2d 11.26b.
- Intentionally discharging a firearm from a motor vehicle so as to endanger the safety of another. MCL 750.234a. See CJI2d 11.37.
- Intentional discharge of a firearm at a dwelling or occupied structure. MCL 750.234b. See CJI2d 11.37.
- Knowingly brandishing a firearm in public. MCL 750.234e.
- Reckless, wanton use or negligent discharge of firearm. MCL 752.863a. See CJI2d 11.26.
- Careless, reckless, or negligent use of firearms. MCL 752.861. See CJI2d 11.20.
- Injuring another by discharging a firearm aimed intentionally, without malice. MCL 750.235. See CJI2d 11.25.
- Carrying a firearm or dangerous weapon with unlawful intent. MCL 750.226. See CJI2d 11.17.
- Possession of a firearm at the time of commission or attempted commission of a felony. MCL 750.227b. See CJI2d 11.34.
- Possession or use of firearm by person under the influence of liquor or a controlled substance. MCL 750.237.

In addition to the foregoing offenses, criminal charges can arise from violation of certain firearms restrictions that arise under federal and Michigan law after a person has been:

- Indicted on felony or misdemeanor charges;
- Convicted of a felony or a misdemeanor crime; or
- Made subject to a personal protection order or a conditional pretrial release order in a criminal proceeding.

The firearms disabilities that result from these court proceedings are discussed in Chapter 9.

6. Kidnapping

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence. See Section 1.7(A)(2) regarding the use of children as a means of controlling the victim.

Abusers may kidnap their partners or others (e.g., children) as a means of asserting control in the relationship. Abusers who kidnap or take hostages are at increased risk for committing acts of lethal violence.*

Parental kidnapping under MCL 750.350a is the subject of Section 3.5. Other criminal statutes governing kidnapping are as follows:

- Kidnapping. MCL 750.349. See CJI2d 19.1-19.2, 19.4. On the elements of this offense and on forms of conduct that can constitute kidnapping, see *People v Jaffray*, 445 Mich 287, 297-300 (1994), *People v Hoffman*, 225 Mich App 103 (1997), and *People v Warren*, 462 Mich 415 (2000).
- Maliciously, forcibly, or fraudulently leading, taking, carrying away, decoying, or enticing away any child under age 14 with the intent to detain or conceal the child from his or her parent or other person having lawful charge of the child. Adoptive or natural parents of a child may not be charged with this crime. MCL 750.350. On the elements of this offense, see *People v Kuchar*, 225 Mich App 74 (1997).

7. Criminal Sexual Conduct

*On abusive tactics, see Section 1.5. See Section 1.4(B) for a list of lethality factors.

Criminal sexual offenses may be committed in the context of a consensual intimate relationship. Sexual abuse is one common control tactic employed by domestic violence perpetrators and Michigan law specifically provides that an individual may be convicted of criminal sexual conduct even though the victim is the individual's spouse. MCL 750.520*l*. See also CJI2d 20.30. When assessing the danger presented by a situation involving allegations of domestic violence, it is important to recognize that an individual who is assaultive to an intimate partner during sex is at increased risk for committing lethal acts of violence.*

*But see Section 5.11 for a discussion of Michigan's rape shield provisions.

Because of its complexity, a discussion of the substantive law on criminal sexual conduct is beyond the scope of this benchbook.* For a detailed discussion of criminal sexual conduct, see Smith, *Sexual Assault Benchbook* (MJI, 2002).

The following Penal Code provisions set forth the elements of criminal sexual offenses:

- First-degree criminal sexual conduct. MCL 750.520b. See CJI2d 20.1.
- Second-degree criminal sexual conduct. MCL 750.520c. See CJI2d 20.2.
- Third-degree criminal sexual conduct. MCL 750.520d. See CJI2d 20.12.
- Fourth-degree criminal sexual conduct. MCL 750.520e. See CJI2d 20.13.
- Assault with intent to commit criminal sexual conduct. MCL 750.520g. See CJI2d 20.17 and 20.18.

A conviction of certain criminal sexual conduct offenses may preclude the person convicted from obtaining custody or parenting time rights to a child. See Sections 12.3 and 12.8(A).

8. Mayhem

MCL 750.397 makes it a felony offense to commit the following acts with malicious intent to maim or disfigure: cut out or maim the tongue; put out or destroy an eye; cut or tear off an ear; cut or slit or mutilate the nose or lip; or cut off or disable a limb, organ or member, of any other person.

9. Stalking

Stalking and aggravated stalking are governed by MCL 750.411h and MCL 750.411i respectively. Electronic stalking is prohibited by MCL 750.411s. These offenses are discussed in Sections 3.7 - 3.12.

10. Malicious Use of Mail or Telecommunications Services

Malicious use of the mail or a telecommunications service may fall within the purview of the criminal stalking statutes discussed in Sections 3.7 - 3.12. Where the facts do not amount to stalking, however, the following statutes may apply:

- MCL 750.540 makes it a two-year misdemeanor to willfully and maliciously prevent the delivery of communications over the telephone, telegraph, cable, or wire. In *People v Hotrum*, 244 Mich App 189 (2000), the Court of Appeals held that ripping a telephone cord from the wall during a domestic violence incident is conduct covered by this statute.
- MCL 750.540e makes it a misdemeanor punishable by six months in jail and/or a $1,000.00 fine to use "any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quite of another person." See *People v Taravella*, 133 Mich App 515 (1984) on the intent that must be established to support a conviction under this statute.
- MCL 750.390 makes it a misdemeanor to "knowingly send or deliver . . . any letter, postal card or writing containing any obscene language with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or other designation, with the intent thereby to cause annoyance to any person, or with a view or intent to extort or gain any money or property of any description belonging to another."
- MCL 750.539a-750.539d impose criminal penalties for unlawful eavesdropping and surveillance. See *People v Stone*, 463 Mich 558 (2001), in which the defendant was charged with eavesdropping on his former wife's private telephone conversations under MCL 750.539c. Because the conversations took place on a cordless telephone, the trial court quashed the information, holding that the conversations were not "private" for purposes of the statute. The Court of Appeals reversed the trial court's decision and the Supreme Court affirmed, holding that

as a matter of law, it was reasonable for defendant's former wife to expect that her cordless telephone conversations were private.

B. Property Offenses

Some abusers seek to exercise control over their intimate partners through criminal behavior directed at their partners' animals or property. Such behavior might result in charges under the following statutes.

1. Cruelty to Animals

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence.

Abuse of pets is a common control tactic of domestic violence perpetrators. Abusers who kill or mutilate their partners' pets are at increased risk to commit lethal acts of violence.* The following statutes penalize animal abuse:

- Crimes against animals. MCL 750.50.
- Willfully, maliciously, and without just cause or excuse killing, torturing, mutilating, maiming, disfiguring, or poisoning an animal. MCL 750.50b.

2. Arson

Arson is governed by the following criminal statutes:

- Willfully or maliciously burning an occupied or unoccupied dwelling, or its contents, or any building within its curtilage, regardless of whether the defendant owns the dwelling. MCL 750.72. See CJI2d 31.1 and 31.2.
- Willfully and maliciously burning any personal property owned by oneself or another. MCL 750.74. See CJI2d 31.4.

The foregoing offenses apply to a married person, although the property burnt may belong partly or wholly to his or her spouse and be occupied by the couple as a residence. MCL 750.76.

It is also a criminal offense to use any inflammable material or device in or near a building or property with the intent to willfully and maliciously set it on fire, or to persuade or procure another to do the same. MCL 750.77.

3. Breaking and Entering, Home Invasion

The following Michigan statutes govern breaking and entering and home invasion:

- Breaking and entering into a building with intent to commit a felony or a larceny. MCL 750.110. See CJI2d 25.1 and 25.2.
- Entering a dwelling or other building without breaking with intent to commit a felony or a larceny. MCL 750.111. See CJI2d 25.3.

- Breaking and entering, or entering without breaking, a dwelling or other structure without obtaining permission to enter. MCL 750.115. See CJI2d 25.4.
- Home invasion. MCL 750.110a. See CJI2d 25.2a - 25.2f and *People v Warren*, 228 Mich App 336, 345-354 (1998), rev'd in part on other grounds 426 Mich 415 (2000) regarding the elements of this offense.

The home invasion statutes can often come into play in cases of domestic violence. In 1999, the home invasion statute was amended by adding provisions for circumstances where an assault occurs in conjunction with a breaking and entering or a breaking and entering occurs for the purpose of assaulting another person. MCL 750.110a(2) provides that a person who does any of the following:

- breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling,
- enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or
- breaks and enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault,

while either armed with a dangerous weapon or while another person is lawfully present in the dwelling, is guilty of first-degree home invasion.

First-degree home invasion is a felony punishable by imprisonment for not more than 20 years or a fine of not more than $5,000.00, or both. MCL 750.110a(5). The court may order a term of imprisonment imposed for first-degree home invasion to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. MCL 750.110a(8).

The elements for a second-degree home invasion are provided in MCL 750.110a(3), which states:

> "A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree."

Second-degree home invasion is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $3,000.00, or both. MCL 750.110a(6).

A person is guilty of third-degree home invasion if the person does either of the following:

- Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.
- Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:
  - A probation term or condition.
  - A parole term or condition.
  - A personal protection order term or condition.
  - A bond or bail condition or any condition of pretrial release.

Third-degree home invasion is a felony punishable by imprisonment for not more than five years or a fine of not more than $2,000.00, or both. MCL 750.110a(7).

Imposition of a penalty under the home invasion statute does not bar imposition of a penalty under any other applicable law. MCL 750.110a(9).

*The statutory provisions took effect Oct. 1, 1999.

See *People v Szpara*, 196 Mich App 270, 272-274 (1992), a case pre-dating the statutory home invasion provisions just described.* In this case, the Court of Appeals upheld the defendant's conviction for breaking and entering into his home where the acts constituting this offense also violated a civil injunction that prohibited him from entering his home. The civil injunction was issued under MCL 552.14, which at that time authorized the trial court in a divorce proceeding to enter a preliminary injunction restraining a party from entering onto certain premises. In upholding the defendant's criminal conviction, the panel reasoned that: 1) the contempt provision of MCL 552.14 was not the exclusive remedy for defendant's actions because this remedy serves a different purpose from the penalties under the breaking and entering statute; and 2) defendant could be charged with breaking and entering into his own home where the divorce court's injunction had removed his right to enter it.

Both misdemeanor and felony assaults may be charged as the underlying offense for first-degree home invasion. *People v Sands*, ___ Mich App ___, ___ (2004). In *People v Musser*, 259 Mich App 215 (2003), the defendant entered the victim's house and sexually assaulted her. The defendant was convicted of first-degree home invasion and fourth-degree criminal sexual conduct. On appeal, the defendant argued that pursuant to MCL 750.110a(2), a home invasion offense must be based upon the intent to commit, or the actual commission of, a "felony, larceny, or assault." The defendant claimed that he did not commit a "felony, larceny, or assault" because criminal sexual

conduct in the fourth degree is a misdemeanor and is not a larceny or an assault. *Id.* The Court of Appeals rejected this argument and held:

> "Although the term 'assault' is not defined within the statute, our Supreme Court has previously defined this term. In *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998), the Supreme Court explained that while the penalty and constituent elements of aggravated assaults are codified, 'the *definition* of assault is left to the common law.' (Emphasis added.) As further stated by the *Reeves* Court, Michigan has defined the term 'assault' as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' *Id*. at 240 (citation omitted).
>
> * * *
>
> "[T]his Court has recognized that [criminal sexual conduct] crimes are actually a specialized or aggravated form of assault. In *People v Corbiere*, 220 Mich App 260, 264; 559 NW2d 666 (1996), recognizing that criminal sexual conduct and assault statutes were enacted to protect distinct legislative interests, this Court indicated that '[t]he Legislature has gone to great lengths to carve out sexual *assaults* from other types of assaults.'(Citation omitted; emphasis changed) . . .
>
> "Thus, the fact that the penalty and constituent elements of [criminal sexual conduct] crimes are codified in a different section than the 'general assault' crimes does not mean that [criminal sexual conduct] crimes do not constitute a specific type of assault. Accordingly, we hold that fourth-degree [criminal sexual conduct] constitutes an assault for the purposes of the home invasion statute, and therefore defendant's conviction for home invasion must be affirmed." *Id.*

4. Desertion and Non-support

One common abusive tactic involves the exercise of economic control over an intimate partner. Abusers who fail to provide necessary shelter, food, care, or clothing for their spouses and children are subject to criminal sanctions under the following provisions:

- MCL 750.136b(3)(a) and (6) impose criminal sanctions for "omissions" that cause a child physical harm or serious mental harm. "Omissions" are defined as a "willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child." MCL 750.136b(1)(c). This statute applies to a child's parent or guardian, or to any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person. MCL 750.136b(1)(d). See CJI2d 17.19 and 17.22.

- MCL 750.167, and MCL 750.168 provide that "[a] person of sufficient ability who refuses or neglects to support his or her family" is a "disorderly person" subject to misdemeanor sanctions.
- MCL 750.165(1) states: "If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both." A person may not be liable under this statute unless he or she "appeared in, or received notice by personal service of, the action in which the support order was issued." MCL 750.165(2).
- MCL 750.161(1) provides that "a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony." For discussion of the elements of this crime, see *People v Coleman,* 325 Mich 618 (1949), and *People v Haralson*, 26 Mich App 353 (1970). See also *People v Law*, 459 Mich 419 (1999) (trial court may award interest on unpaid support under the Crime Victim's Rights Act, MCL 780.751 et seq).
- The Child Support Recovery Act, 18 USC 228(a)(1), makes it a federal offense for a person to willfully fail to "pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000." This statute also makes it unlawful to travel in interstate or foreign commerce with the intent of evading a support obligation that has remained unpaid for longer than one year or that exceeds $5000.00. Penalties for violating the statute include imprisonment and restitution. 18 USC 228 (c)-(d), 3663A. For a case upholding the Act's validity under the Commerce Clause and discussing the proper method of collecting the child support award at issue, see *United States v Bongiorno*, 106 F3d 1027 (CA 1, 1997). For a case concluding that the Act is an appropriate exercise of Congress's power under the Commerce Clause, see *United States v Faasse,* 265 F3d 475 (2000).

Civil remedies for non-support are discussed at Section 7.4(B)(5) and in Chapter 11.

5. Malicious Destruction of Property

Domestic abuse may involve destruction of an intimate partner's personal property. The following criminal statutes apply to this behavior:

- Malicious destruction of personal property of another. MCL 750.377a. See CJI2d 32.2.
- Malicious destruction of or injury to a house or other building of another, or to the appurtenances thereof. MCL 750.380. See CJI2d 32.3.
- Maliciously breaking down, injuring, marring, or defacing any fence belonging to or enclosing another's land. MCL 750.381.
- Malicious destruction of trees, shrubs, plants, or soil. MCL 750.382.

6. Trespassing

Trespassing upon property may amount to criminal stalking, which is discussed above at Sections 3.7 - 3.12. Where stalking is not at issue, however, the following statutes may apply:

- Willfully entering onto another's improved land without permission and with intent to injure the plants growing there. MCL 750.547.
- Willfully entering another's premises after being forbidden to do so. MCL 750.552.
- Trespassing for purposes of eavesdropping or surveillance. MCL 750.539b.

3.15 A Note on Tort Remedies

This section provides information about tort remedies for damages incurred as a result of criminal conduct in cases involving stalking or domestic assault.* For discussion of the interplay between divorce and tort actions based on domestic violence, see Section 11.7.

*General discussion of civil actions filed by crime victims appears in Miller, *Crime Victim Rights Manual* (MJI, 2001), Chapter 12.

A. Civil Suit for Damages Resulting from Stalking

MCL 600.2954 provides a civil remedy for damages resulting from stalking, as follows:*

*Victims of stalking can also petition the circuit court for a personal protection order. This remedy is discussed in Chapters 6-8.

> "(1) A victim may maintain a civil action against an individual who engages in conduct that is prohibited under section 411h or 411i of the Michigan penal code . . . for damages incurred by the victim as a result of that conduct. A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section.
>
> "(2) A civil action may be maintained under subsection (1) whether or not the individual who is alleged to have engaged in conduct prohibited under section 411h or 411i . . . has been charged or convicted under section 411h or 411i . . . for the alleged violation.
>
> "(3) As used in this section, 'victim' means that term as defined in section 411h."

MCL 750.411i(1)(g) and MCL 750.411h(1)(f) define "victim" as "an individual who is the target of a willful course of conduct involving repeated or continuing harassment."

No appellate cases have been decided under MCL 600.2954 as of the publication date of this benchbook.

B. Intentional Infliction of Emotional Distress

Prior to the effective date of MCL 600.2954, victims of stalking behavior availed themselves of such common law tort remedies as intentional infliction of emotional distress. *Haverbush v Powelson*, 217 Mich App 228 (1996) illustrates the elements of this cause of action and the remedies available. In *Haverbush*, plaintiff, an orthopedic surgeon, was harassed over a two-year period by a registered nurse at the same hospital where he worked. When the nurse's behavior escalated to the point where the surgeon feared for his life and the safety of his patients, he obtained a temporary restraining order against the nurse and sued her for intentional infliction of emotional distress. After trial, the court found Powelson liable and awarded the surgeon $11,615.00 in damages. The court also issued an injunction, which, among other things, required the nurse to apply for a transfer at the hospital so as to avoid contact with the surgeon and his patients. On appeal from the trial court's judgment, the nurse argued that: (1) her conduct was not extreme and outrageous; (2) Haverbush failed to prove severe emotional distress; and (3) the court erred in granting an injunction.

Affirming the trial court's decision, the Court of Appeals acknowledged that liability for intentional infliction of emotional distress may be found only where the defendant's conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." 217 Mich App at 234. However, after reviewing the record, the Court concluded that a rational trier of fact could find that Powelson's conduct was sufficiently extreme and outrageous under this standard. *Id.*

Although the Court agreed that the plaintiff must prove severe emotional distress, it emphasized that the extreme and outrageous character of a defendant's conduct may, in itself, establish that element of the cause of action. *Dickerson v Nichols*, 161 Mich App 103, 107-108 (1987). Although the surgeon presented no evidence that he sought medical treatment for emotional distress, the Court nevertheless concluded:

> "On the facts of this case, severe emotional distress was established by Haverbush's testimony (1) that Powelson's letter accused him of harassment, (2) that he was especially fearful after Powelson left the ax and the hatchet on his vehicles, (3) that Powelson's letters caused him great concern that she was going to interfere with his wedding, (4) that he was worried about his reputation because of what Powelson said about him to others, (5) that he was concerned with his patients' safety, and (6) that Powelson's actions affected the way he did his work." 217 Mich App at 235-236.

With respect to the injunction, Powelson argued that it should not have been granted because there existed an adequate remedy at law (i.e., the stalking law and the peace bond statute). The Court disagreed. Citing *Peninsula Sanitation v Manistique*, 208 Mich App 34, 43 (1994), the Court stated that the existence of criminal or economic penalties is not an adequate remedy at law if it requires a party to return repeatedly to court. The Court stated:

> "In light of the overwhelming evidence of Powelson's actions over nearly three years to harass and inflict distress and fear in Haverbush, the trial court did not err in concluding that Haverbush had no adequate remedy because the remedies proposed by Powelson here would require him to return to the police or the courts repeatedly." 217 Mich App at 237-238.

The Court then addressed the trial court's order that required Powelson to apply for a transfer within the hospital. Powelson argued that the order was ineffectual and difficult to enforce, and that it impaired her occupation and livelihood. The Court disagreed. It noted that 90 percent of Haverbush's patients were on Powelson's floor, and that given Powelson's "bizarre behavior," the order was justified. The Court emphasized that the order would effectively minimize contact between Powelson and Haverbush and Haverbush's patients, and that it merely required Powelson to apply for a lateral transfer to another floor. 217 Mich App at 239.

> **Note:** For cases discussing intentional infliction of emotional distress in domestic contexts other than stalking, see *Bhama v Bhama,* 169 Mich App 73 (1988) (alleged destruction of plaintiff's relationship with her children), and *McCoy v Cooke*, 165 Mich App 662 (1988) (alleged physical and mental abuse of plaintiff). These cases are discussed in Section 11.7(A).

C. Statute of Limitations

MCL 600.5805 sets forth a five-year period of limitations for the following civil actions brought by a plaintiff who has been assaulted or battered by a domestic partner:

- Actions charging assault or battery, MCL 600.5805(3) and MCL 600.5805(4); or
- Actions to recover damages for injury to a person or property, MCL 600.5805(11) and MCL 600.5805(12).

The five-year period of limitations applies in cases where the defendant is:

- The plaintiff's spouse or former spouse;
- A person with whom the plaintiff has had a child in common;
- A person with whom the plaintiff has or has had a dating relationship; or

- A person with whom the plaintiff resides or has formerly resided.

*See subsections (2) and (9) for these provisions. The statute also provides specific limitations periods for other actions, including malicious prosecution, libel, slander, and misconduct or neglect by a constable, sheriff or sheriff's deputy.

Prior to the enactment of the foregoing provisions, the actions they describe were subject to a two-year period of limitations for an action charging assault, battery, or false imprisonment, and a three-year period of limitations for a general action to recover damages for the death of a person, or for injury to a person or property not otherwise covered by the statute.*

The amended limitations periods apply to:

- Causes of action arising on or after February 17, 2000 under MCL 600.5805(3) and MCL 600.5805(11) that involve a spouse or former spouse, an individual with whom the plaintiff has had a child in common, or a person with whom the plaintiff resides or formerly resided.
- Causes of action under MCL 600.5805(3) and MCL 600.5805(11) that involve a spouse or former spouse, an individual with whom the plaintiff has had a child in common, or a person with whom the plaintiff resides or formerly resided in which the period of limitations described in MCL 600.5805(2) has not expired by February 17, 2000.
- Causes of action arising on or after January 1, 2003 under MCL 600.5805(4) and MCL 600.5805(12) that involve a dating partner.
- Causes of action under MCL 600.5805(4) and MCL 600.5805(12) that involve a dating partner in which the period of limitation described in MCL 600.5805(2) has not expired as of January 1, 2003.

The period of limitation described in MCL 600.5805(2) is two years for an action charging assault, battery, or false imprisonment.